

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1455

Docket No. 77-1455

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-v.-

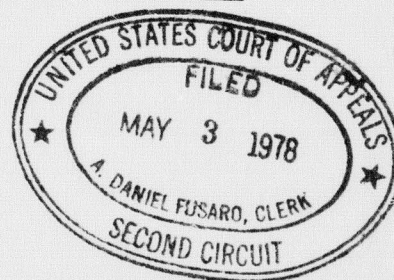
DANIEL B. ZOGBI,

Defendant-Appellant.

On Appeal from the United States District Court
Northern District of New York

BRIEF AND APPENDIX FOR APPELLANT

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In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-v.-

DANIEL B. ZOGBI,

Defendant-Appellant

On Appeal from the United States District Court
Northern District of New York

BRIEF AND APPENDIX FOR APPELLANT

ISSUES PRESENTED FOR REVIEW

- I. Did the Government fail to sustain the burden of proving beyond reasonable doubt that the statements made by defendant were given freely, voluntarily, and intelligently and that defendant's rights against self incrimination were adequately protected?
- II. Whether the evidence obtained as a result of defendant's interrogation can be used against him?

STATEMENT OF THE CASENature and Disposition of Case in Court below

The appellant was initially indicted under Count I with violating Title 18, United States Code, §§922(1) and 924(a) of the Federal Firearms Statute with regard to importation of firearms and under Count II with violating Title 18, United States Code, §545, of the Customs Statute, in allegedly smuggling goods into the United States.

At the trial of the action before Hon. Lloyd F. MacMahon, Jr., United States Judge, Southern District of New York, sitting by designation in the Northern District of New York, the Government proceeded on the first count against defendant, the second count was dismissed and defendant was convicted of the first count.

This appeal by the defendant was timely filed by the filing of an original and four copies of a notice of appeal on April 22, 1977, in forma pauperis with the United States District Court, Clerk, Northern District of New York.

Statement of Facts

Prior to the trial of this action a suppression hearing was conducted with regard to the voluntariness of statements made by the defendant to Frank Kopesky and one Conrad, Special Agents of the Treasury Department, in the United States Custom office. (Tr. pp. 17-38, App. pp. 8-29).

On July 29, 1976, at approximately 12:10 a.m. defendant entered the United States at the Port of Highgate Springs, Vermont. (Tr. p. 21, App. p. 12). Shortly thereafter he was brought into a customs office at the border and asked by the agents to write a list of the items he was transporting to Canada. (Tr. pp. 22-3, App. pp. 13-14). The agents then confined the defendant in a small room. He remained in this room for approximately 4 hours until 4:15 a.m. (Tr. pp. 23-4, App. pp. 13-14). While in this office he was questioned by the agents. (Tr. p. 24, App. p. 15). Defendant further testified that he was not given his Miranda warning until 4:15 a.m. at which time he was placed under arrest, handcuffed and transported to jail. (Tr. pp. 23, 25, App. pp. 14, 16).

Agent Kopesky testified that he read the Miranda warning to defendant before any questions were put to him. (Tr. pp. 29-31, App. pp. 20-22). These warnings were allegedly read to the defendant while the defendant was detained in the aforementioned small room. (Tr. p. 33, App. p. 24).

Kopesky also testified that the defendant willingly answered his questions (Tr. p. 31, App. p. 22), that he and Agent Conrad were present during the questioning (Tr. p. 32, App. p. 23), and that the questioning lasted intermittently for approximately 45 minutes to one hour. (Tr. p. 37, App. p. 28).

Agent Kopesky testified that he could not recall that after he initially read to the defendant his Miranda rights, that the defendant did not give an affirmative response, that he

understood his rights and would waive them. (Tr. p. 36, App. p. 27). However, Kopesky when questioned by the Government testified that the defendant indicated to him that he understood his rights. (Tr. p.31, App. p. 22).

The Court denied the motion stating that it seemed clear that the Miranda warnings were given, and that even if they were not given, the Miranda rule only applies to custodial interrogations and that there was no custody at the time of the questioning. (Tr. pp. 38-39, App. p. 6-7).

At trial Agent Kopesky testified that the defendant stated to him that he entered into the United States on July 25, 1976 with a barrel receiver to a firearm which he had repaired by the manufacturer at Numrich Arms in West Hurley, New York, (Tr. pp. 122-23, App. pp. 30-31). Defendant further stated that he did not declare the barrel action receiver when he entered the United States on July 25, 1976. (Tr. p.124, App. p. 32). The defendant further stated that upon initially entering the United States on July 25, 1976 and not being allowed entry because of the firearms that he carried, he returned to Canada, broke the firearm down in its component parts, placed the barrel action receiver back in to his vehicle and returned to the port of entry, Champlain, New York, on July 25, 1976, a few hours later. He also admitted that he did not claim the barrel action receiver at the port of entry, Champlain, New York. (Tr. pp.125-26, App. pp. 33-34).

The barrel action receiver which was seized from the defendant on July 29, 1976, was not the same receiver which he

allegedly entered into the United States with on July 25, 1976.

ARGUMENT

POINT I

THE GOVERNMENT FAILED TO SUSTAIN THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE STATEMENTS BY DEFENDANT TO SPECIAL AGENTS OF THE TREASURY DEPARTMENT AT THE UNITED STATES BORDER AT HIGHGATE SPRINGS, VERMONT, ON JULY 29, 1976, WERE GIVEN FREELY, VOLUNTARILY AND INTELLIGENTLY

- A. Any Statements Given By the Defendant Were Not Voluntary Considering the Totality of the Circumstances.

Miranda v. Arizona, 384 U.S. 436, (1966), simply provides a threshold requirement that certain procedures must be complied with before the question of voluntariness can even be considered. The Miranda requirements are factors to be considered in the totality-of-the-circumstances approach to testing voluntariness.

The defendant's statements made to Agents Kopesky and Conrad were involuntary in the light of the totality of the circumstances. Certainly, Zogbi was taken into custody or otherwise deprived of his freedom in a significant way. The agents first ordered Zogbi to go to a front desk at the customs house to write a list of items that the defendant intended to bring across to the Canadian border. The agents then directed him to a small room in the customs house. (Tr. pp. 23,24, App. pp. 14,15). While confined in said room he was questioned for a period of one to four hours. (Tr. pp. 23-25, App. pp. 14-16). Moreover there is no evidence that the defendant signed any written waivers to make a voluntary statement.

The size of the room, the length of time questions were put to the defendant by two agents, the early hours of the morning, and the confinement of the defendant in said room lends credence to the fact that defendant was in custody at the time of questioning. Each of these factors should be considered in determining the voluntariness of defendant's statements. Reck v Pate, 367 U.S. 433 (1961).

"Custody" is defined as a deprivation of freedom in a significant way. Miranda, supra at 444. There is a psychological coercion implicit in interrogations where the defendant is instructed to remain in an isolated chamber and finds himself completely and suddenly cut off from freedom of movement. There is little doubt that if Zogbi attempted to leave the small room in the customs office, that the agents would have imposed immediate detention. Obviously, Zogbi was either physically deprived of his freedom of action or was led to believe, as a reasonable person, that he was so deprived. People v. Rodney P., 21 N.Y.2d 1,9 (1967). See also, People v. Paulin, 25 N.Y.2d 445 (1969).

The Trial Court itself expressed a doubt that any constitutional warnings were given but concluded that the environment was non-custodial. (Tr. pp. 38-39, App. pp. 6-7).

Nonetheless, if Zogbi entertained an objectively reasonable belief that he was not free to leave during the interrogation, then he was "deprived of his freedom of action in a significant way." United States v Hall, 421 F.2d 540, 544-45 (2nd Cir. 1969).

The defendant was interrogated in "privacy" and in "unfamiliar surroundings," factors greatly stressed by the Miranda decision. Miranda, supra at 449-50; see also, Beckwith v. United States, 425 U.S. 341, 346 n.7 (1976). Surely, the most recent decision by the United States Supreme Court in Oregon v Mathissen, 45 L.W. 3505 (January 17, 1977), does not sanction a police officers circumvention of Miranda by deliberately postponing an official arrest until necessary incriminating statements have been secured. Id at 3506 n.5.

B. The Government Has Not Established
That Defendant Understood and Waived
His Miranda Warning.

Even assuming, arguendo, that some type of consitutional warning was given to the defendant, there is conflicting testimony from Agent Kopesky as to whether or not Zogbi knowingly, intelligently and voluntarily waived his rights. (Tr. pp.36,31, App. pp. 27, 22). The Supreme Court in Miranda recognized that although rights can be waived, the Government, which has control of the locale and the conditions of custodial interrogation, carries a heavy burden in establishing the fact of waiver.

If the defendant did state that he understood his rights with no explicit statement that he waived any Miranda constitutional protections, there remains no express waiver. The defendant's alleged statements does not compensate for the absence of a specific waiver. People v Anonymous, 58 Misc.2d 13 (Co. Ct. Nassau Co. 1968). There was no express statement by Zogbi waiving his rights to the aid of counsel or to submit to

interrogation without counsel. See also, People v. Jacobsen, 57 Misc.2d 1046 (Co. Ct. Nassau Co. 1968).

A stronger guaranty that constitutional rights have been observed is necessary rather than a mere "swearing contest" between an accused and one interrogating police officer. State v. Davis, 438 P.2d 185 (Wash. Sup. Ct. 1968). The court in Miranda stressed:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by his statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in Carnley v. Cochran, 369 U.S. 506, 516, (1962) is applicable here: presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver. (Emphasis added). Id at 475.

An express statement requires the affirmative act of the accused in the form of a specific answer to the question relating to waiver of such rights. A response by an individual about to be interrogated that he "understands" the Miranda warning does not sufficiently comply with the Miranda requirements. An understanding of the meaning of the warning simply indicates that he possesses sufficient comprehension of his constitutional rights to make an intelligent choice, but is not an express statement constituting a waiver of the individual's constitutional rights. "Waiver" has been defined as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The record

herein is void of any word, act or gesture constituting an express waiver of the defendant's privilege against self incrimination and his right to counsel

For these reasons the Trial Court erred in denying defendant's motion to suppress.

POINT II

NO EVIDENCE OBTAINED AS A RESULT OF DEFENDANT'S INTERROGATION CAN BE USED AGAINST HIM.

The statements elicited from the defendant on July 29, 1976, resulted in the government obtaining a barrel action receiver from Numrich Arms Co., West Hurley, New York, allegedly transported to New York on July 25, 1976, together with further investigation. Since the defendant's rights against self incrimination were contravened during his custodial interrogation, all other evidence obtained from exploiting the information contained in his oral statements as a result of said interrogation must be excluded as fruits of the poisoned tree. Miranda, supra at 479. Harrison v. United States, 392 U.S. 219 (1968).

The record is barren of any other evidence of a knowingly unauthorized importation of a firearm.

CONCLUSION

It is respectfully submitted that the conviction of Daniel B. Zogbi be reversed, that the indictment be dismissed and that the case be remanded to the District Court for entry of a Judgment of Acquittal.

Respectfully submitted,

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LIST OF PARTS OF THE RECORD
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U.S. TITLE/SECTION OFFENSES CHARGED ORIGINAL COUNTS
T18 §922(1), 924(a) Unlawful importation of firearm Ct. 1 2
T18 §545 Fraudulent importation of " Ct. 2 2
CLOSED
SUPERSEDING COUNTS

BAIL • RELEASE
AMT Fugitive
Set Pers. Recog
PSA
Date 7/29/76
10% Deposit
Surety Bond
Bail Not Made
Collateral
Status Changed (See Docket)
3rd Ptry Cust
Other

II. KEY DATES & INTERVALS
ARREST or INDICTMENT ARRAIGNMENT TRIAL
U.S. Custody Began High Risk Date Information 8/18/76 Trial Set For 2/22/77
7/29/76 Summons Served Indict. Waived 1st Plea NG G NOL
First Appearance 7/29* In Charging District Superseding Indict/Info Final Plea NG G NOL
Trial Began 2/24/77
Trial Ended 2/24/77

SENTENCE
Disposition of Charges 2/24/77
Convicted On All Charges
Acquitted On Lesser Offense(s)
Dismissed WOP: W
On Government's Motion

MAGISTRATE
Search Warrant Issued Return
Summons Issued Served
Arrest Warrant Issued
COMPLAINT 7/29/76
OFFENSE (In Complaint) 18§922L & 545- unlawfully import a firearm.
INITIAL APPEARANCE DATE 7/29-76
PRELIMINARY EXAMINATION OR REMOVAL HEARING
Date Scheduled 8/6
Date Held
X WAIVED NOT WAIVED
INTERVENING INDICTMENT
Tape Number
OUTCOME
DISMISSED
HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst. Paul French, Asst.
ATTORNEYS Defendant X CJA Ret Waived Set None / Other
Peter E. Murphy
Kevin K. Ryan-9/17/76

Show last names and suffix numbers of other defendants on same indictment information
DATE (DOCUMENT NO.) PROCEEDINGS EXCLUDABLE DELA
1976
Aug. 18 Filed Indictment
Aug. 19 Transferred Mag. Papers, Mag. #53181, CJA Form, Financial Affidavit, Comm. Temporary Commitment, Complaint, Appearance Bond and Bail Reform Form.
Aug. 23 Defendant's attorney requested that matter be adjourned to 9/1/76 at Albany and Judge Port grants the extension of time pursuant to T18 (3161(h)(8), defendant unable to afford the trip to Auburn.
9/1/76 Due to the illness of Peter Murphy, Kevin Ryan appears for the defendant with the consent of defendant. The defendant is arraigned and pleads not guilty. Twenty days to file motion for reduction of \$2,000.00 cash bail is denied. Continued on bail.
9/17/76 Filed CJA Form 20, copy 5 appointing Kevin K. Ryan as Atty.
10/5/76 Filed letter from Judge Foley extending time to file Motion to Oct. 14, 1976..
3/1/77 Off.

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY
1976	DOCUMENT NO.		
Oct. 19	Filed Motion for Discovery and Inspection and Motion for Suppression of Evidence returnable Nov. 1, 1976.		<i>included in +</i>
Nov. 1	Motion for suppression of evidence by deft-deferred until time of trial. Motion for discovery & inspection - adjourned to Nov. 15 by consent.	3	11/1/76 E 1
Nov. 15	Adjourned to December 6, 1976		3 11/1/76 + 49
			12/20/76
6	Adjourned to Dec. 20, 1976 at request of plaintiff.		<i>included in +</i>
Oct. 20	Motion for discovery and inspection by deft - granted to the extent furnished by the Govt. otherwise denied.	3	12/20/76 E 1
Dec. 20	Filed Discovery Material.		
1977			
Jan. 28	Ready.		
Feb. 22	Trial - The Jury is drawn and sworn. Mr. Ryan moves for motion of Suppression on grounds stated. Government heard in argument. Decision reserved. Motion to Suppress - denied. Mr. McCann opens, Mr. Ryan opens. Court stands in recess.		
Feb. 23	Trial resumes - Jury brought in Courtroom. Ct. 2 dismissed. McCann reads Stipulation. Government rests. Court resumes at 2:25 P.M. Mr. McCann sums up. Mr. Ryan sums up. Mr. McCann in rebuttal. Court in recess.		
Feb. 24	Trial continued. Judge charges jury from 10:05 A.M. to 10:30. Jury retires at 10:30. Jury returns at 10:58 with a verdict of guilty to Count one. Mr. Ryan moves to set aside verdict-denied. Gov't. moves to revoke bail on deft. bail increased to \$10,000-Surety Bond. Gov't moves to put travel restrictions on deft.-deft. restricted to home in Canada, N.D.N.Y. and Dis. of Vermont. Sentencing set for 4/22/77 at Utica, n.Y. at 11:00 A.M.		
Feb. 24	Filed Court exhibit # 1.		
Feb. 25	Application for reduction of bail - denied, without prejudice to renewal before a local district judge.		
Feb. 28	Filed Memo of Law, Filed Memo of Law.		
Feb. 25	Filed Trial Memo of U.S., Gov't. request to charge, Stipulation, Gov't. Requested Voir Dire Exam. of Jury.		
March 7	Filed Appearance Bond from District of Vermont, \$8,000 case in Registry in District of Vermont. Surety Issa Bishara Zogbi.		
March 11	Filed Original of Motion for Re-trial by telegram and copy of Judge MacMahons letter to A.U.S.A.		
March 18	Filed copy of letter to Judge MacMahon from AUSADiBianco requesting extension of time to reply to defts' motion for new trial.		

B
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DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
<u>1977</u>	(Document No.)				
Mar. 29	Filed Copy of Letter from Assistant U.S. Attorney McCann to Judge MacMahon.				
Mar. 29	Filed Government's Memorandum of Law, Defendant's Motion for Retrial.				
Mar. 29	Filed Miscellaneous Papers in support of Government's Position with regard to Motion for new trial by defendant.				
Apr. 18	Filed Government's Reply Affidavit and Memorandum of Law regarding Defendant's Father's Request for Return of Bail.				
Apr. 18	Filed Copy of Letter from the U.S. Attorney's Office to Judge MacMahon w/attachment regarding assignment of counsel.				
Apr. 22	Mr. Ryan moves to withdraw as attorney - denied. Mr. Zogbi moves for a new trial on grounds stated - motion is denied. The Court advised the defendant of his right to speak in his own behalf, defendant spoke, his attorney spoke. Defendant is sentenced to sixty (60) days, to run concurrently with the sentences heretofore imposed by the United States District Court for the District of Vermont, upon defendant's convictions on indictments 76-60 and 76-79(S). Motion for reduction of bail is heard and denied. Bail continued at \$10,000.00 pending appeal. Defendant is advised of his right to appeal.				
Apr. 22	Filed Judgment and Probation and 2 copies delivered to the U.S. Marshal. Execution of Judgment stayed pending appeal.				
Apr. 22	Filed Memorandum of Judge MacMahon denying deft's. Motion for New Trial.				
Apr. 22	Filed Motion for Reduction of Bail with following endorsement of Judge MacMahon "The within motion for reduction of bail is denied following argument in open Court and the present bail of \$10,000.00 fixed in this District is continued pending appeal. So Ordered. April 22, 1977, Utica, N.Y. Honorable Lloyd F. MacMahon, U.S.D.J.				
April 22	Filed Notice of Appeal.				
April 26	Filed Copy 2 of CJA 20 Form.				
May 4	Filed Copy 2 of CJA 20 Form.				

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

DANIEL B. ZOGBI

INDICTMENT

Cr. No. 76-CR-80

(VIO: Title 18, U.S.C.,
Sections 922(1), 924(a),
and 545)

COUNT I

THE GRAND JURY CHARGES:

That on or about July 25, 1976, at or near Champlain, in the State and Northern District of New York, DANIEL B. ZOGBI, the defendant herein, did knowingly import or bring into the United States a firearm, to wit: the receiver, for one Thompson semi-automatic carbine, serial number 1729, Model 1927A1.

In violation of Title 18, United States Code, Sections 922(1) and 924(a).

COUNT II

THE GRAND JURY FURTHER CHARGES:

That on or about July 25, 1976, at or near Champlain, in the State and Northern District of New York, DANIEL B. ZOGBI, the defendant herein, fraudulently and knowingly did import or bring into the United States certain merchandise, to wit: the receiver, for one Thompson semi-automatic carbine, serial number 1729, Model 1927A1, contrary to law, in that the merchandise is a firearm under Title 18, United States Code, Section 921(3)(B), which was imported or brought into the United States contrary to the provisions of Title 18, United States Code, Section 922(1) and Title 18, United States Code, Section 925(d), and Title 27, Code of Federal Regulations, Sections 178.111, 178.112 and 178.113, and in that the said merchandise was not presented for inspection by a Custo-

officer at the first port of entry at which such merchandise arrived in the United States, nor manifested as required by law, contrary to the provisions of Title 19, United States Code, Sections 1459 and 1460, and in that the required declaration of such merchandise was not made pursuant to the provisions of Title 19, United States Code, Section 1481.

In violation of Title 18, United States Code, Section 545.

A TRUE BILL

H. J. Neal Cuddy
FOREMAN

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would be good for you if you tell us what you know?
Did you ever ask him questions, was your interview
prefaced with this?

THE COURT: You're asking him forty
questions, ask him one. You don't let him
answer, did you do this, did you do that, did you
do this--get prepared to cross-examine, we will
see you at 2:15.

(Whereupon a brief recess was taken).

THE COURT: Proceed.

MR. RYAN: I have no more questions.

THE COURT: No more questions, the
Government rests?

MR. MCCANN: The Government rests.

THE COURT: Do you rest?

MR. RYAN: Yes.

THE COURT: I deny the motion to suppress.
The evidence goes contradicted. The credible
evidence having been observed, the witness--it
seems clear that Miranda warning was given.
There is no reason--so, at the threshold, there
can't be any question in my mind, I find that
Miranda warning were given accepting the
testimony, but even if there were not, there is

no question the Miranda Rule only applies to interrogations when a defendant is in custody, and there can be no question at the time of the initial interviews here at the office, at the border station there in Champlain, there in Vermont where he was taken, there was no custody at that time, that followed later, and carrying still a step further, there is nothing showing that any of this was at all involuntary in any way. There is not the slightest hint of coercion anywhere in the testimony of the defendant or any circumstances showing overreaching or overbearing his will in anyway. I find, therefore, that the statements were made after a fair warning and after a Miranda warning. They were made freely and voluntarily, they were not the product of coercion and are admissible, and I deny the motion. These will constitute the Court's findings of fact and conclusion of law. Proceed, bring in the Jury. In making these rulings, I want the record to note we are bypassing questions concerning the untimeliness of the motion without in anyway producing the Government's motion in anyway. Alright, Mr. McCann?

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THE COURT: There has been an off the record Conference with the Court from which develops that there is an outstanding undetermined motion to suppress something. Exactly what it is, I don't know, I haven't seen the motion papers. Could I see them? First of all, it was brought to my attention after we impaneled the Jury.

MR. RYAN: Your Honor, I believe this--how the event occurred, I made a motion for discovery--

THE COURT: (Interrupting) Where was the motion, do you have a set of motion papers?

MR. RYAN: No, it was a discovery motion for any--

MR. MCCANN: (Interrupting) These are a copy of the papers that were served on the United States Attorney's Office.

THE COURT: I don't know, I never understood why people didn't put two papers in one instead of two, do you? The only suppression motion you made here, Mr. Ryan, and it is one to suppress certain articles which you don't describe.

MR. RYAN: Well, that motion, Your Honor, has been withdrawn.

THE COURT: You have withdrawn that?

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MR. RYAN: Yes.

THE COURT: And you now--but you want to make another motion, do I understand you correctly?

MR. RYAN: At the discovery--I made a motion for any statements that were made. I didn't know if any had been made that would be used at the special term, the motioned term, Mr. French of who represents the Government indicated to me that that type of motion would take place at the time of the trial.

THE COURT: Well, you are the Lawyer in the case, Mr. French isn't advising you how to practice Law, is he?

MR. RYAN: No, I think, Your Honor, if I could perhaps go into when I'm cross-examining the witness--

THE COURT: (Interrupting) It isn't a Jury question ordinarily. I mean, if you want to suppress something, you must make a motion. What motion do you want to make?

MR. RYAN: It concerns the voluntariness of the statements--

THE COURT: (Interrupting) Of what

statements?

MR. RYAN: That the Government is going to use, the statements made by the Defendant.

THE COURT: What statements? You said you discovered them, you ought to be able to identify them.

MR. MCCANN: All the statements that the Defendant made have been provided to opposing Counsel, Your Honor. He made statements at the time of his initial entry on July 25--

THE COURT: (Interrupting) I don't care what they were, I just want to know specifically which ones he wants to suppress and why.

MR. RYAN: Your Honor, in the case history provided me by the Government--

THE COURT: (Interrupting) Mr. Ryan, you are obviously not prepared. I'll take a short recess. Pull your thoughts together, see if you can produce for me exact statements you want suppressed and your grant for a motion and I'll entertain it, perhaps.

(Whereupon a brief recess was taken.)

THE COURT: Alright, Mr. Ryan, have you got a motion set up now?

MR. RYAN: Yes, Your Honor.

THE COURT: Alright, let me here it.

MR. RYAN: In the case history provided by the United States Attorney's Office, the case history refers to an interrogation of Mr. Zogbi at and near Highgate, Vermont. The statement reads, customs--Special Agent Conrad and Kobesky then interviewed Zogbi after advising him of his Constitutional Rights, as on page 5 of the case history. On page 6, there is a statement, Zogbi stated that he had entered the United States on Sunday, July 25, 1976 at the Port of Entry Champlain, New York and had not declared the barrel action to customs, and the 4th paragraph on page--there is the further statement he stated that he left the assault rifle at his residence, then proceeded with Kennedy to Champlain, the Port of Entry, where he didn't declare the receiver to customs, because he "did not want any hassles with customs". Those two statements are the statements I wish to suppress.

THE COURT: On what grounds?

MR. RYAN: Mr. Zogbi has informed me it was late at night, and he has doubts as to the

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voluntariness of the statements.

THE COURT: That isn't enough.

MR. RYAN: And as to the question of whether before he made the statements he was read his Constitutional Rights.

THE COURT: He denies, does he? Put him up there, he hasn't got an affidavit, I don't know whether you want to put him up there--

MR. RYAN: (Interrupting) Yes, yes.

THE COURT: But I have to have some factual basis for a motion.

DANIEL ZOGBI,

called as a witness, after having first been duly sworn, testified as follows:

EXAMINATION BY MR. RYAN:

- Q. Mr. Zogbi, on or about July 29, did you have occasion to be at or near Highgate, Vermont?
- A. Yes, I did.
- Q. Is that near the Canadian Border?
- A. That is correct.
- Q. Approximately what time of the morning or night did you meet customs--special U.S. customs officials?
- A. About 12:10 A.M.
- Q. Now, did there come a time when you were subsequently

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physically taken from the customs station and
incarcerated?

A. Yes, there was.

Q. And what time was that, approximately?

A. Basically about 10 or 15 minutes after I was
stopped by U.S. Customs. I was taken inside to the
front desk where they had me write down a list--

Q. (Interrupting) Okay, but was there a time when you
actually left the customs house and was brought to
jail or someplace?

A. Yes, Sir.

Q. And what time was that?

A. About 4:30 in the morning.

Q. Okay, now, from 12:10 when you first arrived at the
U.S. Customs place until about 4:15 in the morning,
when you were incarcerated--

A. (Interrupting) Right.

Q. Did you--were you interviewed by customs agents?

A. Yes, I was.

Q. Now, can you remember if before they asked you any
questions they read you your rights, and did they tell
you that you could--that any statements you made would
be used against you or that you could have a right to
call an attorney, did they give you any warning before

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they took these statements?

A. No, they did not. What happened is, they took me into the front desk about 15 minutes after I stopped on the primary, and they asked me to write a list of the items I had. Two agents came down, one which was Special Agent Kopesky, and the other was Conrad, and they asked me to go into a small office.

Q. Did they at anytime during the night read you your rights?

A. Only when I was arrested.

Q. Only when--

THE COURT: (Interrupting) After your arrest?

MR. ZOGBI: Right, when--while I was arrested, Your Honor.

Q. When you say arrested, do you mean actually--at 4:15 when you were brought into a patrol car, some sort of a vehicle and transported into a jail?

A. After I was handcuffed by a special agent I was read my rights then.

Q. Was this before or after you made the statements?

A. After I made the statements.

THE COURT: Where did you make the statements, when they first stopped you?

MR. ZOGBI: They told me to go into the front

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desk with the parts--

THE COURT: (Interrupting) At the custom station?

MR. ZOGBI: Right, at Highgate Springs, and told me to write a list of the merchandise I had.

THE COURT: Did you do that?

MR. ZOGBI: Yes, I did.

THE COURT: Then what happened?

MR. ZOGBI: Then while I was writing the list up, I just finished--Special Agent Kopesky and Conrad came down the stairs from a room above and they told me to go--I think it was Special Agent Kopesky, told me to go into a small room behind the counter and to sit there and wait, and they came a few minutes later and started questioning me about the parts, and they got to the receiver, they said where did you get the receiver from, and most of the questions were basically concentrated around the receiver, where I got it from, and how it came to be in my possession at that time.

THE COURT: And you told them?

MR. ZOGBI: I told them.

THE COURT: What did you tell them?

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MR. ZOGBI: I told them that I had taken the receiver from Montreal, I had--I told them the incident, what happened with the two rifles that morning on July 25th in the morning, and how I was refused entry with them. So, I went back to Montreal and left the rifle at home and took the Thompson apart and brought back only the barrel action receiver with me, then I went through customs, and that the customs--the primary--he had inspected--he looked into my trunk and he saw it, it was beside a CB set I had, and I entered into New York and went to West Hurley, where I replaced the receiver to have it repaired with the warranty, and I took it back to Montreal, and that is the night I was arrested on the 29th.

Q. That is all I would have to offer, that to the best of your recollection, before you were interviewed, before you made certain statements about your entry into the United States, you weren't advised of any rights?

A. As far as I can--the only time I was read my rights was--I believe Richard Mayer (phonetic spelling), when I was arrested around 4 o'clock in the morning, 4:15 in the morning.

MR. RYAN: That is all I have, Your Honor.

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THE COURT: Cross-examination?

EXAMINATION BY MR. MCCANN:

Q. You were examined by Special Agent Kopesky of the United States Customs. Did you also make the statements that you didn't declare the receiver barrel originally because you didn't want any hassles with United States Customs?

A. I didn't make the statement exactly that way. Do you want me to go into detail--

THE COURT: (Interrupting) I'm not concerned with what he said, I am concerned if there was any illegality here, Mr. McCann, at this point.

MR. MCCANN: I have no questions then of this witness.

THE COURT: Alright, Okay.

MR. MCCANN: Your Honor, at this time, the Government would like to produce a witness.

THE COURT: What do you say about the sufficiency of what he has said?

MR. MCCANN: I--he stated--was insufficiency stated on the record.

THE COURT: I heard the statements, why is it insufficient?

MR. MCCANN: It was the customs search and

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inspection upon entry to the United States which the Defendant has testified to, he stated he can remember--he doesn't remember his rights being given to him. I feel that its insufficient at this time. The law is quite explicit that there is no need to show probable cause.

THE COURT: Now--we are not talking about a search, we are talking about an interrogation.

MR. MCCANN: He was questioned, Your Honor, concerning the merchandise he had in his automobile at the time he was stopped at the border.

THE COURT: And you say there is no need to give any warning--

MR. MCCANN: (Interrupting) I can produce Mr. Kopesky's testimony--

THE COURT: (Interrupting) I don't care what he says, we are talking about his testimony--

MR. MCCANN: (Interrupting) Are not given at the border.

THE COURT: Not whether--what--

MR. MCCANN: (Interrupting) At the time he was placed under arrest, he has to be given his rights.

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THE COURT: When was he placed under arrest?

MR. MCCANN: According to his own testimony someplace around 4:00, 4:30 A.M. the agent placed him under arrest.

THE COURT: We will reserve--let me hear--

F R A N K K O P E S K Y,

called as a witness, after having first been duly sworn, testified as follows:

EXAMINATION BY MR. MCCANN:

Q. Mr. Kopesky, how are you employed?

A. I'm a Special Agent with the United States Treasury Department, United States Customs Service.

Q. The evening of July 28, 1976, in the early morning hours of July 29, 1976, were you so employed?

A. Yes, I was.

Q. Where were you employed?

A. At Highgate Springs.

Q. On that evening, did you have an opportunity to talk with the Defendant in this case Daniel Zogbi?

A. Yes, I did.

Q. Can you identify the Defendant Daniel Zogbi?

A. Yes, I can, he is wearing a tan suit, sitting between the two gentlemen at that table.

MR. MCCANN: Let the record reflect that the

witness has been identified.

THE COURT: Yes. Did you say Highgate, Vermont?

MR. KOPECKY: Highgate Village, Vermont.

Q. Approximately what time did you interview the Defendant Daniel Zogbi?

A. Approximately a quarter past twelve, that is midnight on July 29th.

Q. Prior to the interview, did you advise the Defendant of any of his rights as required by law?

A. Yes, I made him aware of his Constitutional Rights.

Q. Would you tell the Court, please, how you advised the Defendant of his rights?

A. I read them off of a card that I carried.

Q. Do you have that card with you now?

A. Yes, I do.

Q. Could you show that card to the Court, please?

MR. MCCANN: Could we have this marked Government's Exhibit "7"?

Q. I show you Government's Exhibit "7" for identification, can you identify that?

A. Yes, this is the card that I carry with me at all times, and it is what I use too when I interview people to make them aware of their rights.

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Q. Did you have that card with you at 12:15 A.M. on July 29, 1976 at Highgate Springs, Vermont?

A. Yes, I did.

Q. Did you have that card with you when you advised the Defendant Daniel Zogbi of his rights?

A. Yes, I did.

Q. Would you tell the Court, please, exactly what you advised the Defendant of?

A. "Before we ask you any questions, it is my duty to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in Court or other proceedings. You have the right to consult an attorney before making any statements or answering any questions, and you may have him present with you during the questioning. You may have an attorney appointed to you by the United States Commission, or the Court to represent you if you cannot afford or otherwise obtain one. If you decide to answer questions now, with or without a lawyer, you still have the right to stop the questioning at anytime or to stop the questioning for the purposes of consulting a lawyer. However, you may waive the right to advice of Counsel, and your right to remain silent, and you may answer questions and make a statement

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without counseling a lawyer, if you so desire".

Q. Did the Defendant respond to your questions after you read the Defendant his rights as you have just stated, did the Defendant make any statements to you?

A. Yes, he asked me if there was any problem.

Q. Did the Defendant indicate to you that he understood his rights?

A. Yes, he did.

Q. And--

THE COURT: (Interrupting) What did he say?

Q. What did the Defendant say?

A. The Defendant stated--at first asked if there was any problem, and I told him that we didn't know at the time, but that we would like to question him about the merchandise in his possession. He said that he would be willing to answer questions pertaining to the merchandise.

Q. Did you ask any questions of the Defendant prior to advising him of his rights as you have just read?

A. No we did not.

Q. Was there anybody else present when you interviewed the Defendant?

A. Yes.

Q. Who was present?

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A. Special Agent Conrad.

Q. Is he a Special Agent with the United States Customs?

A. Yes.

Q. If you know, do you know where he is today?

A. Presently he is a Special Agent--Conrad is assigned to the Office of Special Agents in charge at Laredo, Texas.

MR. MCCANN: I have no further questions of this witness, Your Honor.

THE COURT: Cross-examination?

MR. RYAN: Thank you, Your Honor.

EXAMINATION BY MR. RYAN:

Q. In the early morning hours of July 29, did there come a time when Mr. Zogbi was transported from the customs house to a detention facility?

MR. MCCANN: I object to this question, it is out of the scope of direct examination and not concerned with whether the Defendant was properly advised of his rights at the interview.

THE COURT: Sustained.

Q. Do you recall where he was, Mr. Zogbi was advised of his rights?

A. Pardon?

Q. Where--

A. (Interrupting) Where was he advised of his rights?

Q. Yes?

A. At the border crossing station at Highgate Springs, Vermont, in a room on the customs side of the station and towards the back.

Q. Had he made any statements to you prior to this time, that he had been up for most of the night and was very tired, did he make any statements as to his physical condition at this time?

A. Not that I can recall.

Q. Did he make any statements to you before you read him his rights?

A. No.

Q. Any statements pertaining to any items he might have in his car?

A. No, he did not.

Q. You stated he was willing to testify as to materials that he possessed?

THE COURT: He wasn't testifying.

Q. Willing to make a statement as to items he had in his possession? Can you state from your own knowledge what the initial purpose of the conversation was, what items it concerned?

MR. MCCANN: Again I object, Your Honor,

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that is irrelevant at this point.

THE COURT: I don't think so. I really don't think your relevance is too good either, except it is a little out of sequence. He is entitled to-- that these statements were not made voluntarily.

A. Could you repeat the question?

Q. Okay, what material items, physical goods were the initial subject of the conversation with Mr. Zogbi?

A. A barrel action for a Thompson semi-automatic carbene.

Q. Were you summoned to the border at Highgate Falls, Vermont?

A. No, I was not, I was stationed at Highgate Springs, Vermont.

Q. And did you have cause to inspect the car or see that the car that Mr. Zogbi was riding in was inspected?

A. I'm not an inspector, I don't make inspections.

Q. Do you know if it was--of your own knowledge if the car was inspected?

A. Yes.

Q. And were you as a result of this inspection called, summoned to the border station?

A. I was already at the station.

Q. Were you summoned by inspectors?

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A. Yes.

Q. And was there a purpose stated to you as to why Mr. Zogbi--why the case should be referred to you?

A. Yes.

Q. Were there any items found in the car?

THE COURT: You can put leading questions, you are cross-examining, it might speed this thing, and it might help me to find out what your driving at here.

MR. RYAN: Yes, Your Honor, I'm sorry.

Q. Were there any other items other than the Thompson gun found in the car?

A. Yes.

Q. What were they?

A. Various gun parts, in particular I can recall a 45 caliber barrel, a magazine for an AR 15 semi-automatic riffle--

Q. (Interrupting) So, certain guns and firearms were found in the car?

A. Yes.

Q. And isn't that the reason why you questioned Mr. Zogbi, to find out what the purpose of all these guns that were in the car, in the back of his car, isn't that the topic of your conversation, the number of guns in

the back seat or the trunk or wherever they were?

A. Yes.

THE COURT: Mr. Ryan, could you come up here?

Q. Did you--when Mr. Zogbi was in the room, who else was in the room, I know an agent was in the room, was there anybody else in the room when you read him his rights?

A. No.

Q. Now, you stated his response was, is there a problem?

A. Yes.

Q. So, initially, he did not give an affirmative response that he understood his rights and would waive--

A. (Interrupting) Not that I can recall.

Q. Alright, now, could you state after he initially said, is there a problem, what then did you say?

A. I stated that we did not know at this time, we wanted to ask him some questions pertaining to the merchandise in his possession and would he be willing to answer questions pertaining to this merchandise.

THE COURT: What time of night was this?

MR. KOPESKY: That would have been approximately 15 minutes past midnight on the morning of the 29th.

THE COURT: How long did you have him there that night?

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MR. KOPESKY: He was interviewed intermittently for approximately 45 minutes to an hour, but not continuously.

THE COURT: Did you give him anything to eat or drink?

MR. KOPESKY: Possibly coffee, there was no food available up there.

THE COURT: Is there coffee up there?

MR. KOPESKY: Yes, I don't know for sure if coffee was given or not.

THE COURT: Did he ask for anything?

MR. KOPESKY: Not that I can recall.

THE COURT: How many officers--

MR. KOPESKY: (Interrupting) There was one other Special Agent besides myself.

THE COURT: Just two?

MR. KOPESKY: Yes.

THE COURT: Did he at anytime indicate that he didn't want to talk to you?

MR. KOPESKY: Not that I can recall.

MR. RYAN: If I might, Your Honor?

2. Did you make any statements to the Defendant Zogbi as to the appropriateness in making statements, in telling you something, did you ever state, for instance, it

would be good for you if you tell us what you know?
Did you ever ask him questions, was your interview
prefaced with this?

THE COURT: You're asking him forty
questions, ask him one. You don't let him
answer, did you do this, did you do that, did you
do this--get prepared to cross-examine, we will
see you at 2:15.

(Whereupon a brief recess was taken).

THE COURT: Proceed.

MR. RYAN: I have no more questions.

THE COURT: No more questions, the
Government rests?

MR. MCCANN: The Government rests.

THE COURT: Do you rest?

MR. RYAN: Yes.

THE COURT: I deny the motion to suppress.
The evidence goes contradicted. The credible
evidence having been observed, the witness--it
seems clear that Miranda warning was given.
There is no reason--so, at the threshold, there
can't be any question in my mind, I find that
Miranda warning were given accepting the
testimony, but even if there were not, there is

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right to remain silent, and you may answer questions or make a statement without consulting a lawyer, if you so desire."

Q. Did Mr. Zogbi make any statement to you after you read him his rights?

A. Yes, he did.

Q. Did he indicate that he understood his rights?

A. Yes, he did.

Q. How did he indicate he understood his rights?

A. Let me back track a bit, he asked me if there was a problem, and I indicated to Mr. Zogbi that I was not sure, but that we would like to ask him some questions pertaining to the merchandise, and would he be willing to answer questions.

Q. And did Mr. Zogbi make any statement at that time?

A. Yes, he said he would be willing to answer questions pertaining to the merchandise in his vehicle.

Q. I now show you Government's Exhibit "3", can you identify Government's Exhibit "3"?

A. Yes, I can.

Q. Could you tell the jury, please, how you are able to identify that Government's Exhibit "3"?

A. Yes, by the serial number 1722, and my initials,

and the date which I scratched into the receiver here.

Q. When did you scratch your initials into the receiver?

A. In the early morning hours of July 23, 1976.

Q. And what date appears there that you have scratched into the receiver?

A. 07/23/76.

Q. And you stated you did not ask Mr. Zogbi about merchandise, is Government's Exhibit "3" what you wished to question Mr. Zogbi about?

A. Yes.

Q. Did you ask Mr. Zogbi any questions about Government's Exhibit "3"?

A. Yes, I asked him where he had been and where he was going with the barrel receiver in his possession.

Q. What did Mr. Zogbi reply to you?

A. Mr. Zogbi stated that he had entered the United States at the Port of Champlain on July 25, 1976 with a barrel action receiver from Montreal and was headed for West Hurley, New York, as the receiver in his possession at that time was defective and he wanted to replace it or exchange it for one that was not.

THE COURT: That was four days before this interview with you?

MR. KOPECKY: Yes, Your Honor.

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Q. What then did you do?

A. I asked Mr. Zorbi if he had declared the barrel action receiver in his possession at that time to the Customs Inspector on duty at Champlain on the 25th.

Q. What did Mr. Zorbi reply?

A. He stated that he had not.

Q. Did he make any further statements to you?

A. Approximately at this time in the interview, I received a phone call.

Q. Did you leave the interview room?

A. Yes, I did.

Q. Did you return to the interview room after the phone call?

A. Yes, I did.

Q. As a result of the phone call, did you do anything?

A. Yes, I informed Mr. Zorbi that I had received information that on July 25th, he had gone to the Port of Champlain and that he had declared two rifles to the Customs Inspector on duty and he was interviewed by a special agent from the United States Customs, and the Bureau of Alcohol Tobacco and Firearms, and informed that he was not allowed or authorized to bring these weapons into the United States.

Q. Did you make any further statements or questions to Mr. Zogbi?

A. Yes, I confronted him with this information and asked him how he got the barrel action receiver through the border.

Q. What did Mr. Zogbi reply?

A. He admitted that the fact it was true, that he was stopped by Customs and interviewed by a special agent, and they turned him back and he returned to his residence in Montreal in Canada, and placed one rifle back in his residence, broke the other rifle down in its component parts, placed the barrel action receiver back in his vehicle and returned to the Port of Champlain a few hours later.

Q. Did Mr. Zogbi tell you when he returned to the Port of Champlain a few hours later whether he declared the barrel action receiver?

A. He told me he didn't claim the barrel action receiver at the Port of Champlain.

Q. Did he make any other statements to you?

A. I asked him why he didn't declare the barrel action receiver on the second trip.

Q. What did he reply?

A. He said he didn't declare the barrel action

receiver because he didn't want any hassles from Customs.

Q. Did I show you Government's Exhibit "2", are you able to identify Government's Exhibit "2" which consist of parts "1", "2" and "3", a light bulb base and are these?

A. It looks barrel as if it's a light bulb base similar to the one in Government's Exhibit "2", I believe, barrel action receiver there. It bears the same serial number 1722.

MR. MCCANN: I have no questions of this witness.

MR. RYAN: Your Honor, I fail to see the relevancy of that last question and answer and ask that it be stricken from the record.

THE COURT: I don't see its relevancy either, would you explain its relevancy?

MR. MCCANN: The witness has testified it has the same exact serial number as Government's Exhibit "3".

THE COURT: So what, that light bulb has the same serial number as that one, but what difference does it have to this case, strike it out. I take it the exhibits that you just had

JURY CHARGE

THE COURT: Good morning. Alright, bring in the Jury. Good morning. At this point in the trial, it becomes my duty and function to instruct you on the law that applies to this case. The Court and the Jury have different functions. It is your duty and function to accept the law as I give it to you, whether or not you agree with it, and apply that law to the facts as you find them, whether or not I agree with your findings. In short, I am the exclusive judge of the law and you are the exclusive judges of the facts. You and you alone decide what facts and what value you will give to the evidence. You and you alone decide whether or not to believe a witness, and of course ultimately you and you alone decide whether the defendant is guilty or not guilty. Now, you are not to conclude from any rulings that I have made throughout this trial, or any questions that I have asked, that I have any opinion one way or the other as to the guilt or non guilt of this defendant. That decision is exclusively up to you. Now, how do you go about finding the facts? Finding the facts

is really a process by which you, the Jury, consider the exhibits which have been received in evidence, consider the testimony of all of the witnesses, both the State's witnesses and the defense, all of the facts and figures, and in your mind you draw a conclusion, and that conclusion is the truth. Now, your experience and your common sense tells you the evidence is true and justifies, and leads just where the truth lies in this case. Now, all evidence is of two general types, direct evidence and circumstantial evidence. Evidence is direct when the facts are shown by exhibits which are received in evidence or when sworn to by witnesses who have actual knowledge of them from something that they have seen or heard or felt or touched or some knowledge that they have gained through the exercise of one of their fundamental senses. Now, the classic example of circumstantial evidence is Robinson Crusoe sighting the footprint in the sand. Now, he knew that it wasn't his own print and from that fact that he observed, he drew the only logical conclusion that another human being was on the

Island. Now, not all circumstantial evidence is that simple, but this is a process that we use in our daily lives. Circumstantial evidence simply means the drawing of a logical conclusion or an inference from other facts which are established by direct evidence. Now, no greater degree of scrutiny is required when evidence is circumstantial or when it is direct, or in the other case you must be convinced beyond a reasonable doubt before you can find any defendant guilty. Now, it is your memory of the evidence that controls now, the way you remember and it is not the way Counsel remembered it. If your memory swears with the lawyers memory as they each gave you their version of what this evidence showed yesterday, you can accept what they say. But, to the extent that you have a different memory of the evidence, you are bound by oath to reject what they say and rely on your own memory. When I say your own memory, I mean your corrective memory. If one of you can't remember the evidence, I am sure that another Juror or Jurors can refresh your recollection. If in the end you can't remember it and you want some of the

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testimony reread, if you will send me a note through your foreman or forelady pinpointing what you want, I will have the Court Reporter search through his notes and find what you want and have him read it to you. Now, one of your most important functions is determining which witnesses you will believe, and this is so as to every witness. You are not to be influenced by the number of witnesses called. Your concern is not with the number of witnesses, but with the quality of their testimony. The first test which you should apply in determining the truthworthiness of a witness is to ask yourself how his testimony adds up when you measure it against your plain everyday common sense. You are not bound to believe unreasonable statements or to accept testimony that defies your common sense. You saw the witnesses in this case, and in determining whether to believe a witness you should consider his conduct and manner on the stand as well as what he said. I saw you watching every witness as they were testifying. Obviously, you were sizing him up. Now, did the witness impress you, was the witness telling you

a straight story? Was he being evasive in any way? Does he have any motive to testify falsely? Is he interested in anyway in the outcome of this case? How strong or weak was his memory? In short, can we rely on him? Can you trust him? You ought to consider also his opportunity to know the facts about which he testified and the probability or improbability of what he said. Now does his testimony add up when you consider it along with all the other evidence and with the physical evidence, the exhibits, which have been received in evidence? Are there any inconsistencies in his testimony, and if so, how important are these? Now, if you find that any witness has deliberately and willfully lied in his testimony on this trial with respect to any material facts, if you wish, you can accept as much as his testimony as you believe, or if you wish, you can reject everything he says. Now, the Defendant, Daniel B. Zoghi, did not take the stand. A defendant is not required to take the stand and testify on his own behalf. He has no burden of proof to sustain in this case. He has denied the charges made

against him by his plea of not guilty, and he is presumed to be innocent. The fact that he has not testified cannot be taken into consideration by you in any manner. You may not permit that fact to weigh in the slightest degree against the defendant, and you must not take that into consideration in your deliberation. Now, before discussing the criminal charges here, I want to remind you that an indictment is a mere accusation. It is no evidence of the truth of the charges made, and you are to draw no inference of guilt from the mere fact that this defendant has been indicted. An indictment simply means that the defendant had been accused, and as I told you earlier, he has denied his guilt by his plea of not guilty, and has no burden of proof to sustain in this case. He is under no obligation to produce any witnesses. He is presumed to be innocent, and this presumption of innocence continues throughout the trial and during your deliberation. This presumption of innocence is overborne only when the Government establishes the guilt of the defendant beyond a reasonable doubt. Now,

as the phrase implies, a reasonable doubt is a doubt that is based upon reason, a reason which appears in the evidence or in the lack of evidence. It is not some vague speculative imaginary doubt nor a doubt based upon emotion, sympathy, or prejudice or upon what some Juror might regard as an intelligent hunch. The Government is not required to find the defendant guilty beyond every conceivable doubt, or because such measure is actually impossible in human affairs, you should review all of the evidence as you remember it, sift out what you believe, discuss it, weigh and analyze and compare your view of the evidence with your fellow Jurors. Now, if that process produces a belief or conviction in your mind of the sort that you would be willing to act upon without hesitation if this were an important matter of your own, then you may say that I have been convinced beyond a reasonable doubt. On the other hand, if after going through that process your mind is waverly or so uncertain that you would hesitate to act if this were an important matter of your own, then you have not been

convinced beyond a reasonable doubt and your verdict must be not guilty. Count 1 of this indictment charges the Defendant, Daniel B. Foghi, with knowingly importing or bringing into the United States a firearm, to wit, the receiver for one Thompson semi-automatic carbine, serial number 1732, Model 1732 A-1, introduced in evidence here as Exhibit "2". In order to convict the defendant on these charges, the Government must prove to your satisfaction beyond a reasonable doubt three essential facts. First, that the defendant imported or brought into the United States the firearm described in Count 1. The term imported or brought into the United States is used in its ordinary sense and means bringing articles, firearms, merchandise, into this country from a foreign country, here from Canada, into the United States. Now, the Government offers as proof the admission of the Defendant made on his third crossing of the border, to the effect that he did import Exhibit "2" into the United States. In support of that, to back up that, the Government offers the testimony of the manager of the gun factory to the

effect that the defendant handed his Exhibit "2", and on the basis of that, the Government asks you to draw a conclusion that the defendant did bring Exhibit "2" across the border, and therefore, did import, against that the Defense Counsel contends that there is no direct evidence of that gun being in here, that there is no direct testimony, no proof that he was ever stopped at the border at anytime during bringing his gun across. The Government counters that with his contention or his statement to the immigration people on the third time when he did not declare the gun when he came across. Now, it is for you to decide what evidence shows in that respect and which of those versions you are going to accept. Now, the term firearm means any weapon which will or is designed to or which maybe readily converted to expel a projectile by the action of an explosive or it means the receiver or frame of any such weapon. You will note that there are four different descriptions of what constitutes a firearm. Now, the Government is not required to prove that the Exhibit "2" fits all four descriptions. It is

enough that the Government never beyond a reasonable doubt that Exhibit "2" fits any one of these four different descriptions. It is for you to decide whether Exhibit "2" was knowingly brought or imported by the defendant into the United States on July 31, 1976. If you find that the defendant did bring into the United States, then you must go to decide whether at that time, Exhibit "2" was designed to expel a projectile by the action of an explosive, in other words, was the gun at that time designed to shoot a bullet or bullets or going now to another alternative, whether at the time of this importation Exhibit "2" would expel a projectile by the action of an explosive, in other words, was the gun at that time in operable condition to fire or shoot, or going to the third alternative, whether at the time of its importation, Exhibit "2" could have been readily converted to expel a projectile by the action of an explosive, in other words, whether the gun at that time could readily be made operable to fire or shoot. And, going to the fourth alternative, whether at the time of its importation, Exhibit

"2" was a frame or receiver of a weapon which was either designed to shoot or which would shoot or which could be easily converted to operable condition. Now, in making your judgement, you have the testimony of the manager of the gun factory, who testified as expert in this case. Now, you are not bound to accept that expert testimony. That testimony was offered simply to help you in a matter which some of us are not very familiar and lack knowledge in the field of guns and this man was allowed to give his opinion about all of these, about Exhibits "2" and Exhibits "3", bearing on whether this was a firearm, as I have defined that term. Now, in making your judgement of whether it was a firearm, you should consider the time and effort, the skill and availability of any missing parts that were needed to make the gun operable at the time of its importation. That of course, is assuming that you find that it was inoperable at that time. Now, the second fact which the Government must prove is that in importing or bringing the firearm into the United States, the defendant acted knowingly. Now, the term knowingly does not

mean that the defendant must know that his conduct is prohibited by law, in other words, the Government does not have to prove that the defendant knew that the Customs laws or that our gun control laws prohibit the importation of firearms. I think, however, as I recall it, that there was evidence to the effect that Abram Kolesky did specifically inform the defendant that he could not bring a firearm into the United States from Canada without authorization, and that he would have to apply on a what they call an ATF, Alcohol Tobacco and Firearm Bureau Form 6, and there is a stipulation in evidence that this defendant never did get authorization and never filed any such application. The term knowingly simply means that the defendant must be aware of what he is doing, in other words, if he had known this item here in Exhibit "2", in his possession, and acted freely and voluntarily and deliberately and on purpose and not because of some mistake, accident, carelessness or other innocent reason, and here, as I recall the evidence, what it came down to was that the defendant came in in the morning and was told to

declare the weapons, was told he couldn't bring them in, he was told it was against the law to bring them in, was told how he would have to get authorized to bring them in, he went back to Canada, came back, that night without declaring it and brought the weapons in. Whether those are the facts is for you to decide, but that is my recollection of the evidence. The third fact that the Government must prove beyond a reasonable doubt is that the importation or bringing of the firearms into the United States was not authorized by the Secretary of Treasury, and here again, they have stipulated that they agree it is conceded that the defendant was not authorized by the Secretary of Treasury to bring in Exhibit "2". You should consider all of the evidence. If upon all of the evidence you find that the Government has failed to establish beyond a reasonable doubt each of the three facts which I have described as required to prove, then you should acquit the defendant. On the other hand, if you find upon all of the evidence that the Government has established beyond a reasonable doubt all three of the essential facts

as I have defined them, that you should convict the defendant. Now, you are instructed that the question of possible punishment of the defendant in the event of a conviction is no concern of yours, nor shall it in any sense enter into or influence your deliberation. Your duty is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of that evidence. Now, when you retire to the jury room, select one of your number to act as your foreman or forelady and to speak for you in your communication with the Court and in the announcement of your verdict. When you retire for your deliberation, treat one another with consideration and respect, as I know you will. If differences of opinion arise, your discussions should be dignified, calm and intelligent. Your verdict must be based on the evidence and the law, the evidence which was presented in the case as you remember it and the law as I have given it to you in this charge. You are each entitled to your own opinion. No juror should acquiesce a verdict against his individual judgment, nevertheless, I would point

out that no one should enter a Jury room with such private opinion that no matter how persuasive or convincing the argument of another Juror may be, that he refuse to change his mind.

Discussion and deliberation are at the very heart of our democratic Jury process. Talk out your differences. Each of you should in effect decide the case for himself or herself. After thoroughly reviewing the evidence and frankly discussing it with your fellow Jurors with an open mind and with a desire to reach a verdict, if you do that, you will be acting in the true democratic process of the American Jury System. Your verdict must be unanimous. All twelve of you must agree. The alternates will be excused before you retire for your deliberation. Any verdict must be the unanimous verdict of all of you, and it must represent the honest conclusion of each and every one of you. I submit the case to you with confidence that you will fully meet up to the oath that you took to decide the issue fairly and impartially and without fear or favor. Now, members of the Jury, if you find that the Government has failed to establish the guilt of

this defendant beyond a reasonable doubt, you should not hesitate for any reason to acquit him. On the other hand, if you find that the Government has established his guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to declare him guilty. Your foreman or forelady then will return and announce a verdict in open court of guilty or not guilty. Are there any exceptions, gentlemen? If so I will hear you up at the bench.

MR. RYAN: None, Your Honor.

MR. MCCANN: The Government has no exceptions, Your Honor.

THE COURT: Alright.

THE COURT CLERK: Raise your right hand. Do you, each of you, solemnly swear you will well and truly keep these persons sworn on this Jury in some private and convenient place, that you will permit no one to talk to them, and that you will not talk to them yourself except to inquire if they have agreed upon a verdict, and until they have agreed?

THE COURT MARMALL: I do.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-vs.-

DANIEL B. ZOGBI,

Defendant-Appellant

AFFIDAVIT OF
SERVICE

RULE 31 OF THE
FEDERAL RULES OF
APPELLATE PROCEDURE

STATE OF NEW YORK) SS.:
COUNTY OF CAYUGA)

CARL CANNUCCIARI, being an attorney at law duly admitted to practice in the State of New York and the United States District Court, Northern District of New York, hereby affirms, under the penalties of perjury, that on May 2, 1978, I sent two copies of appellant Daniel B. Zogbi's brief and appendix to the United States Attorney in this action by ordinary mail as follows:

Hon. John J. McCann
Assistant U.S. Attorney
Northern District of New York
Federal Building
Syracuse, New York 13202

Carl Cannucciari

Sworn to before me this

2nd day of May, 1978.

Notary Public

MARILETTA JOHNSTON
Notary Public, New York

Residing in Cayuga County at the office of Appnt.
Commenced March 30, 1974

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